

(1992) 06 KAR CK 0011
In the Karnataka High Court
Case No : O.S.A. No. 19 of 1991

Syndicate Bank

APPELLANT

Vs

Field Star Cycle Industries P. Ltd. and another

RESPONDENT

Date of Decision : 18-06-1992

Acts Referred:

Companies (Court) Rules, 1959 — Rule 139, 272
Companies Act, 1956 — Section 457 (1), 457 (1) (C)

Citation : (1992) 74 CompCas 79

Hon'ble Judges : R. Ramakrishna, J;K. Shivashankar Bhat, J

Bench : Division Bench

Advocate : K. Radesh Prabhu for M/s. Tukaram S. Pai, for the Appellant; S.M. Chandrashekar, official liquidator and Vijaya Shankar and S. Basavaraju, for the Respondent

Judgement

K. Shivashankar Bhat, J.—The appellant before us was the creditor who filed a petition for winding up of the company which is now shown as the first respondent company in liquidation. This was a private limited company.

2. On March 9, 1983, the court ordered winding up of the company and the official liquidator was appointed as the liquidator of the company. Thereafter the official liquidator took steps to realise the properties of the company and the proceedings as usual were going on.

3. It appears that in the year 1986, the official liquidator filed a report, O.L.R. No. 196 of 1986. This report was filed on July 30, 1986. The said report bears the cause title as between the official liquidator and Karnataka State Small Scale Industries Development Corporation ("KSSIDC" for short). The copy of the report was not served on the petitioner bank or its counsel. The report states that the respondent-Corporation had granted an industrial plot to the company-in-liquidation, on lease-cum-sale basis for 10 years and the lease commenced from December 10, 1971, and that the company's shed contained a Kilburn make oven. The report itself states that this oven was quite costly "perhaps more than

Rs. 50,000". In the report the official liquidator further stated that having regard to the policy of KSSIDC the ownership of the industrial shed may be transferred to the official liquidator so that the shed may fetch a good price at the time of its disposal. The report suggests the payment of arrears, interest, etc., due to the said Corporation to facilitate the transfer of the shed. Appropriate orders on this report was sought for. A copy of this report was served on the KSSIDC on October 20, 1986, as could be seen from the acknowledgment of the said Corporation in the file of the original proceedings. A perusal of the order sheet of the company court on the original side on this Co. P. No. 26 of 1981, shows that the company petition should be posted before the court after showing the name of the petitioner-bank as the winding up petitioner. It is not clear whether this order pertains to this O.L.R. No. 119 of 1986. Nowhere the order sheet refers to the presence of counsel for the petitioner-bank in this regard. However, on July 23, 1987, the learned company judge made an order on this O.L.R. No. 119 of 1986. The cause title to the order refers to the petitioner-bank as well as the name of counsel for the petitioner-bank. The order states that the liquidator's report was perused and the order points out that the KSSIDC had already recognised the ownership of the company of the plot in question together with the shed and it had no objection to its sale according to the procedure. The order further states that :

"Therefore, the official liquidator may call for tenders by advertising in papers both having state wide circulation and local circulation in Dakshina Kannada District like "Udayavani", proposing to sell the shed and the plot with such right, title and interest as the company in liquidation had in the plot and the shed.

So far as the oven in question is concerned, it may be sold separately by advertising in the newspapers.

After the sales are completed as indicated above, the official liquidator will file a report."

4. The official liquidator advertised the sale as could be seen from the newspapers found in the original proceedings. Initially there was an advertisement on July 24, 1990, in "Udayavani" newspaper. This invites sealed tenders within 20 days for the disposal of the plot bearing No. L. 23 measuring 938 square feet and shed constructed thereon, etc. There was another advertisement in the same newspaper on August 21, 1990, inviting sealed tenders within 20 days for the disposal of the said plot measuring 938 square feet and shed constructed thereon, as in the earlier advertisement. The tender notice did not insist on any earnest money deposit or any other condition. The advertisement also referred to the Kilburn make oven as available for sale. The mistake in the extent referred was realised subsequently and, therefore, on September 4, 1990, there was an advertisement of a corrigendum. This corrigendum gives the heading of the company-in-liquidation and thereafter just makes a reference to the advertisement dated August 21, 1990, and then states that the words "938 square feet" may be read as "938 square yards" and nothing

more. This corrigendum, if read by itself, would not convey anything unless it is read along with the earlier advertisement. The date to send the tenders was not extended. In response to the advertisement six tenders were received by the official liquidator and thereafter the official liquidator seems to have addressed all the persons who sent the tenders to the present in his office on November 5, 1990, on which date at 11 a.m. the tenders were to be opened. At that time one of the tenderers, Mr. V. D. Kamath, wrote a letter stating that he was not pressing his tender and therefore his tender need not be opened. After the five tenders were opened, the official liquidator found the tender offered by Super Enterprises was the highest. This tenderer had offered a sum of Rs. 1,25,000 towards plot and shed and Rs. 25,000 for the oven. Consequently, the official liquidator filed his report No. 196 of 1990 dated November 8, 1990, seeking the approval of the court for the acceptance of this highest offer of Super Enterprises (hereinafter referred to as "the second respondent") and deliver possession of the land and the shed etc. to the said purchaser. The official liquidator also sought permission to execute the transfer deed on receipt of the amount.

5. It is also necessary to note here that the advertisement nowhere referred to the date within which the consideration amount should be paid. However the second respondent seems to have paid the sum of Rs. 5,000 as token advance after the official liquidator accepted the highest quotation.

6. The court accepted this report on November 23, 1990. Admittedly the copy of this report was not furnished to the petitioner-bank nor to its counsel. There is also no dispute that the petitioner was not notified of the proceeding before the court pertaining to this report. There is also no dispute that the cause list issued by the court did not mention the name of the advocate for the petitioner-bank when this report was posted for orders. The order of the court is typed in the order sheet itself which permitted the official liquidator to accept the tender of the second respondent, etc.

7. According to the appellant, it was not aware of the court order and on November 26, 1990. The bank wrote to its counsel at Bangalore stating that the bank learnt from the official liquidator of the receipt of certain tenders and according to the information of the bank the highest bid appears to have been tendered by Sharada Press of Mangalore for Rs. 1,50,000. The bank asked counsel to protest against the acceptance of this tender because a couple of years earlier in an open auction of the property there was a bid for Rs. 3,00,000 but the sale could not taken place on account of the objection filed by one of the directors of the company. Immediately counsel for the petitioner-bank wrote to the official liquidator on December, 7, 1990, on this question with a copy of the letter received by counsel from the bank. The counsel also requested the official liquidator not to proceed with the sale. On December, 20, 1990, the bank again wrote to its counsel stating that the court has accepted the tender of the second respondent and that the highest bid by this second respondent appears to be a collusive action to defeat the banker's claim. Therefore, the bank requested

counsel to file an appeal against the order of the court. In the meanwhile on December 17, the official liquidator informed counsel for the petitioner-bank the order of the court on the O.L.R. NO. 196 of 1990.

8. According to the appellant, counsel came to know of the order only by this communication received from the official liquidator and immediately steps were taken to obtain the certified copy of the order which was obtained on January 29, 1991. The appeal was filed on February 6, 1991, alone with an application for condonation of delay. There was also a prayer for the stay of the operation of the order of the learned company judge made on O.L.R. NO. 196 of 1990. The said application also sought a direction to the official liquidator not to give possession of the property in question. On this the court ordered notice. However on March 19, 1991, the second respondent took possession of the property in question and according to the second respondent it received the notice of the appeal only June 26, 1991. It is obvious that even the official liquidator received the notice after June, 1991. On September 10, 1991, the delay in filing the appeal was condoned and on September 24, 1991, the appeal was admitted and a direction was issued to the second respondent not to alter the condition of the property as it stood on the said date.

9. The appellant contends before us that the entire proceedings for the sale of the property in question are void and at any rate the order of the court on the report of the official liquidator seeking approval of the acceptance of the highest tender is entirely illegal.

10. Learned counsel for the applicant contended that when admittedly the appellant was the petitioner seeking winding up of the company in question, it was absolutely necessary to issue notice to the petitioner before the sale was ordered and confirmed. In this regard learned counsel referred to section 457(1) (c) of the Companies Act and rules 139 of the Companies (Court) Rules, 1959/ Sri Vijay Shankar, learned senior counsel appearing for the second respondent, on the other hand contended that the appellant was fully aware of the proceedings taken for the sale of the properties in question and rule 139 was not at all attracted at the stage of the official liquidator seeking the approval of the court for the acceptance of the tender. Alternatively, it was contended by learned counsel that the second respondent has effected vast improvements after taking possession of the properties and this fact has been brought out in the affidavits filed on behalf sought by the appellant. In the affidavit filed on August 20, 1991. Krishna who is the manager of the second respondent, stated that in the year 1985, the second respondent had purchased a similar property measuring 7,650 square feet (15 cents) of land for Rs. 30,000 from KSSIDC and that the said Corporation is now selling plots nearabout the property in question at the rate of Rs. 4,000 per cent payable in instalments. In support of this a resolution of the KSSIDC is enclosed to the affidavit. The property in question is 17 cents and therefore the deponent stated that the sale price of Rs. 1,50,000 was quite reasonable and the oven in question was quite old and would not fetch more

than Rs. 12,000. In another affidavit filed on November, 15, 1991, Ganesh Kamath the partner of the second respondent firm stated that the second respondent had erected a new shed after taking possession of the old shed and demolishing the old shed which was in a dilapidated condition. The approximate cost of erecting the new shed is stated to be Rs. 4,00,000. In addition to this, according to this deponent, machinery for running a powder coating unit has also been installed in the new shed. These facts are brought to our notice by learned counsel to plead equity in favour of the second respondent and according to the learned counsel, the second respondent is in no way responsible for the alleged failure to comply with the procedural requirements of law governing the sale of the properties by the official liquidator.

11. Having regard to the above contentions two questions require to be considered : 1. Whether it is mandatory requirement that the petitioner should have been notified to the proceedings for the approval of the sale of the property belonging to the company-in liquidation, when the sale was ordered earlier after obtaining an appropriate direction from the court ? and 2. If the requirement of the notice as above is mandatory, whether this court should refrain from declaring the sale as void by recourse to any principle of equity ?

12. Reg. Question No. 1 : Before considering the scope of rule 139 referred to by learned counsel for the appellant it is necessary to refer to a decision of the Supreme Court which has bearing on the interpretation of rule 139 and the purpose behind the requirement of a notice to the petitioner. In *Smt. Jatan Kumar Golcha Vs. Golcha Properties (P) Ltd.*, it was held that if a notice is not issued to the landlord when the leasehold rights of the company under liquidation are ordered to be sold, the landlord is entitled to question the order by filing an appeal. It was further held that the official liquidator as well as the company judge are bound by the rules of natural justice to issue a notice to the landlord before ordering the sale. Referring to the rule in question which provides for taking out summons for directions not only with reference to the settlement of the list of contributories and the list of creditors but also the exercise by the official liquidator of all or any of the powers u/s 457(1) and any other matter requiring directions of the court, it was observed that the exercise of the power u/s 457(1)(c) to sell the immovable and movable property of the company by public auction or private contract would certainly fall within the ambit of the rule. The Supreme Court observed 41 Comp Cas 233

"It is implicit that if the directions which has to be given by the court would affect any person prejudicially he must be served with a notice of the summons under the general rule of natural justice and that no order should be made affecting the rights of a party without affording a proper opportunity to it to represent its case. The High Court was thus clearly in error in not entertaining and deciding the appeal proffered by the appellant who was the owner of the land in which leasehold rights said to have been created by her in favour of the company in liquidation were sought to be sold."

13. From this it is clear that if a person is prejudicially affected and was entitled to a notice but not notice was issued, the proceedings could be challenged by the said person by filing an appeal. The phraseology of rule 139 of the Companies (Court) Rules, 1959, is identical to the rules referred to by the Supreme Court in the above decision.

14. In *Navalkha and Sons Vs. Ramanuja Das and Others*, it was pointed out that, where the acceptance of the offer by the commissioners is subject to the confirmation of the court the offered does not, by mere acceptance, get any vested right in the property so that he may demand automatic confirmation of his officer. The condition of confirmation by the court operates as a safeguard against the property being sold at an inadequate price whether or not it is a consequence of any irregularity or fraud in the conduct of the sale. In every case it is the duty of the court to satisfy itself, having regard to the market value of the property, that the price offered is reasonable. Unless the court is satisfied about the adequacy of the price the act of confirmation of the sale would not be a proper exercise of its judicial discretion. In this connection it is also necessary to note that as per rule 272, unless the court otherwise orders in any winding up no property belonging to the company shall be sold by the official liquidator without the previous sanction of the court and every sale shall be subject to confirmation by the court. From this it is quite clear that confirmation by the court is absolutely necessary to complete the sale and this is because, as the Supreme Court pointed out in the above case, the court is the custodian of the interests of the company and its creditors and the sanction of the court required under the Companies Act has to be exercised regard being had to the interest of the company and its creditors as well. Before confirmation the court may have to consider several questions pertinent to the bona fides of the tenders offered, the propriety and validity of the procedure followed including the question whether there was a proper advertisement and whether intending purchasers had proper notice of the sale and the details of the properties, etc. This is possible only if the court has the assistance of the interested parties like the petitioner who moved the court for winding up of the company as the creditor of the company-in-liquidation. There can be no doubt that the petitioning creditor is a person interested in the realisation of a proper price for the assets of the company-in-liquidation because the quantum of realisation by the creditor from the official liquidator depends upon the price that would be realised on sale of the property. At this stage, when the list of creditors and contributors is not finalised the court may not have before it any one else other than the official liquidator to assist the court in the matter of confirmation of sale of the property of the company-in-liquidation. Therefore, rule 139 will have to be read to advance the objectives sought to be achieved by the above principles governing the confirmation of the sale by the official liquidator.

15. Section 457(1)(c) confers a power on the official liquidator, with the sanction of the court, to sell the immovable and movable properties of a company-in-liquidation, etc. Rule 139 clearly states that the official liquidator, inter alia, shall

take out a summons for directions with regard to the exercise by him of all or any of the powers u/s 457(1) and any other matters requiring directions of the court.

16. We are of the view that this part of the rule 139 will have to be broadly constructed so as to require the official liquidator to take out notice, to the petitioner who filed the winding up petition, at the time the official liquidator seeks confirmation of the sale of the property of the company-in-liquidation. This would aid the court to examine the procedures properly and make an appropriate order to advance the interests of the company as well as its creditors.

17. The sale is not complete unless the offer is judicially accepted. According to Mr. Vijaya Shankar, if there is already a direction by the court to sell the property by public auction or by inviting tenders, at subsequent stages the winding up petitioner need not be notified because the petitioner could as well watch the activities of the official liquidator and take proper steps at any stage if the petitioner so thinks it necessary. It is not possible to accept this line of thinking. The petitioner who filed the winding-up petition has no obligation to with the proceedings and activities of the official liquidator throughout. Law does not expect the petitioner to wait at the door steps of the official liquidator at all. The official liquidator, being the officer of the court, is expected to exercise his powers having regards to the purpose behind such a power vested in him.

18. The starting point for the sale of the property will be an order of the court permitting the official liquidator to sell the property by following a particular method. But the sale will be complete only after the official liquidator obtains the confirmation under rule 272 and takes steps to execute the sale deed, if any, and completes the transaction. At least at two stages, i.e., at the initial stage of taking steps to sell the property and next at the concluding stage of the confirmation of the sale, orders of the court are to be obtained, without which there cannot be a proper exercise of the power of sale by the official liquidator u/s 457(1)(c). Therefore, when section 457(1) requires the sanction of the court for the exercise of the power of sale by the official liquidator, the said sanction would include the requirement of the confirmation of the acceptance of the highest bid without which there cannot be a proper exercise of the powers vested in the liquidator u/s 457(1).

19. The above view of ours also derives support from a Bench decision of the Gujarat High Court in *East India Company v. Official Liquidator* [1969] 2 Comp LJ 253 : [1970] 40 Comp Cas 297 (Guj) P. N. Bhagawati C.J., as he then was, of the Gujarat High Court, speaking for the Bench, pointed out that the rule of *audi alteram partem* is embodied in rule 139 and, therefore, any contravention of the said rule would render the entire proceedings void ab initio.

20. Since without the Court's confirmation, the sale would not be complete, the stage of such confirmation has to be held as an integral component of the sale refracted to inspection 457(1)(c) and, therefore, at that stage also requirement

of a notice to the winding up petitioner under rule 139 is mandatory.

21. Reg. Question No. 2 : The question is whether any rule of enquiry comes to the aid of the second respondent to sustain the sale confirmation in its favour. Mr. Vijaya Shankar referred to the principle pertaining to the property estoppel stated by Philip H. Pettit in his book in Enquiry and the Law of Trust, fifth edition. The principle stated is the same as found in Snell's Principles of Enquiry (Twenty-Seventh edition at page 565). This principle has no application to the facts of the case. The fact situation before us arose in the course of winding up proceeding where certain statutory requirements which are to be strictly adhered to by the official liquidator have not been followed. The principle involving proprietary estoppel or any other doctrine based on enquiry has not application where the statute lays down a particular procedure based on public policy (like following the principled of natural justice). It is common knowledge that there can be no estoppel against the statute and no equity would result out of proceedings conducted in violation other law. Mr. Vijaya Shankar, however, contended that confirmation of the sale is a matter of discretion and that discretion has been exercised by the learned company judge. Again, this principle is not applicable here because the condition precedent for the exercise of the power by the official liquidator has not been complied with at all in the instant case. The doctrine of discretion is attracted only when other mandatory requirements are complied with.

22. It was further contended that the price fetched at the sale is quite proper and no injustice would result by keeping alive the sale. Here again it is not possible for us to go into the said question. The appellant has pointed out that on an earlier occasion there was a bid of Rs. 3,00,000 for the same property but the sale could not be completed due to certain objections by one of the directors of the company. Learned counsel for the appellant pointed out that the advertisement for sale itself was not clear and conveyed the impression that only 938 square feet of land was proposed to be sold instead of 938 square yards and this mistake was not properly rectified by an appropriate exhaustive advertisement subsequently. Learned counsel also pointed out that all the tenders were submitted by or on behalf of the second respondent only; for example, two unopened tenders were sent by V. D. Kamath, c/o. Super Caster, Post Box No. 1025, etc., which is the same address as that of the second respondent. When we opened the said tenders in the court it was found that the tenders referred to the plot measuring 938 square yards through on the said date of the tender the notification actually referred to the property as 938 square feet. Further, the offer was for Rs. 1,60,000 for the plot and the shed and Rs. 30,000 for the oven. Subsequently, this tenderer requested the official liquidator not to open the tender. Another tender is in the name of Sharada Type Foundry. Its telephone No. 28389 is the same as that of the second respondent.

23. Learned counsel for the appellant pointed out that all the six tenders were by the same groups and, therefore, the auction conducted was improper and that all

these tenders were earlier to September 4, 1990, i.e., earlier to the corrigendum advertised regarding the extent of the plot.

24. We are not going into this aspect of suspicious circumstances emphasised by learned counsel for the appellant since the appellant is entitled to succeed on the first ground alone.

25. For the reasons stated above, we are constrained to set aside the confirmation of sale in favour of the second respondent. The confirmation proceedings will have to be proceeded with afresh after giving an opportunity to the appellant herein to file its objections and after considering the same. We clarify that it is open to the appellant to plead and prove, inter alia, that it had no notice of the proceedings regarding O.L.R. No. 119 of 1986, resulting in the order dated July 23, 1987, for the sale of the property in question, while objecting to the O.L.R. No. 196 of 1990.

26. Appeal is allowed accordingly.